rule of riparian ownership should control, and the contention of Colorado, that international law should be the rule of decision.[7] The court holds, on principles as broad as those suggested in the Articles of Confederation, that equality of right and a balance of benefits should be the rule of law in interstate controversies, and suggests that the body of law which the court is building up in this manner is "interstate common law."

It is necessary, however, to employ this phrase cautiously, for "interstate common law" had, of course, no prototype antedating the formation of the Union.[8] But the conception of such a body of law is not fanciful, if simply taken to mean the principles established by the Supreme Court in its decisions of interstate disputes. In this sense it does not involve the much discussed question whether there is a common law *of* the United States as well as *in* the United States.[9] For even though it is readily admitted that a separate federal common law of private rights does not exist, the Supreme Court is not forced to apply the common law of the states in the settlement of controversies between the states. That, indeed, would frequently be impossible, as when the rules of law of the conflicting states are opposed to each other. Moreover, it would deny the quasi-sovereign character of the states. This quasi-sovereignty, however, — the fact that a state as *parens patriae* has a higher status than a private person — is so well recognized by the Supreme Court that the mere fact that a state has no pecuniary interest in a controversy does not defeat the original jurisdiction of the court.[10] The notion of a body of law applying peculiarly to interstate relations and this idea of quasi-sovereignty are interdependent. The latter justifies the former; the former is made necessary by the latter. The sanction for such law is to be found in the general language of Article III of the Constitution, which wisely provided for a flexible and progressive system of law by omitting to define the standards which should control the Supreme Court.

CLAIM OF UNCONSTITUTIONALITY BARRED BY ESTOPPEL. — The contention, not infrequently made, that a party can never be estopped from setting up unconstitutionality, is universally denied, but the treatment of the question in the cases is far from satisfactory. Our courts do not sit to revise the work of their co-ordinate department of government, the legislature. Their duty is to decide the controversy of the parties then before them. If the application of a certain statute to the case would result in a clear violation of the constitution, they will refuse to apply it. This, it would seem, is the rationale and extent of judicial power to declare legislation unconstitutional.[1] Moreover, as it is the duty of the legislature to act according to the constitution, the courts will naturally presume it has done so, and will apply the statute unless reason is shown why they should not.[2] The ques-

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[7] See 8 HARV. L. REV. 138.

[8] *Cf.* Penn *v.* Lord Baltimore, 1 Ves. 443.

[9] See Von Holst, Const. Law, 161n; 36 Am. L. Rev. 498.

[10] Missouri *v.* Illinois, 180 U. S. 208. See also Kansas *v.* Colorado, 185 U. S. 125, 142.

[1] Marbury *v.* Madison, 1 Cranch (U. S.) 137, 177, 178; Von Holst, Const. Law, 62; Cooley, Const. Lim., 7 ed., 228.

[2] See 7 HARV. L. REV. 129.

tion of estoppel is brought into some situations where, from the foregoing, it would seem unnecessary. It is controverted whether the state is estopped from setting up the unconstitutionality of a statute. The question is frequently only one of materiality. If the state is not affected thereby, the constitutionality of the statute is not at issue, since the court need not refuse to apply the statute to the case before it lest it violate the constitution, and therefore the state cannot go into the question.[3] It is said, when a public officer is sued for money collected under a statute in his official capacity, he is estopped from denying its constitutionality to defeat the recovery. Again the question of constitutionality is immaterial. Granted the statute is unconstitutional, still as between him and the state, on principles of agency or trusts, the latter is entitled to money he avowedly collected for it.[4] The question of constitutionality may thus be eliminated from other situations,[5] but not from all. When a person has accepted benefits under a statute,[6] or when he has merely begun suit under it, he is commonly said to be estopped from denying its constitutionality when it is attempted to impose upon him the liabilities created by it.[7] Clearly this is not strict estoppel, for both parties are equally cognizant of the facts, and there is no misrepresentation of fact acted upon. Still the courts feel that the adoption of such inconsistent positions in these situations would be contrary to fairness and justice. Much the same feeling causes them to prevent a man dealing with a corporation as such from questioning the legality of its existence. For want of a better expression, apparently, they say the party is estopped. The truth is that the courts apply the statute to the case at bar because the party should not be permitted to show them why they should not.

In a recent Kentucky case this doctrine was extended to estop everybody from denying the constitutionality of an apportionment statute in effect thirteen years. *Adams* v. *Bosworth*, 102 S. W. 861. This would seem to be going too far. It is difficult to see how the party has adopted inconsistent attitudes producing an unfair situation. And the weight of authority has properly not extended the doctrine to estop one who has been merely passive, nor even one who has voted under a statute.[8] Theoretically the mere efflux of time should be immaterial, as the court violates the constitution as much in applying this statute now as it would have thirteen years ago, and statutes have been declared unconstitutional after longer lapses of time.[9] Then there is also the consideration that the whole community should not be kept from inquiring into a matter reaching, as this does, the very foundations of government.[10] It amounts to constitutional amendment in a most informal way. The expressed fear of the court that the opposite holding would create enormous confusion through invalidating so much legislation, is unfounded, for, as another recent decision [11] pointed out, the legislatures elected under an unconstitutional apportionment are *de facto* ones, and as such their acts are entirely valid.

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[3] People *v.* Brooklyn, etc., R. R., 89 N. Y. 75; Atty.-Gen. *v.* Perkins, 73 Mich. 303.
[4] People *v.* Bunker, 70 Cal. 212; Chandler *v.* State, 1 Lea (Tenn.) 296.
[5] *Cf.* State *v.* Gardner, 54 Oh. St. 24; State *v.* Heard, 47 La. Ann. 1679.
[6] There are a few dicta to the effect that if he also requested the passage of the statute, he can be held in quasi-contract. See Shepard *v.* Barron, 194 U. S. 553.
[7] Daniels *v.* Tearney, 102 U. S. 415; Great Falls Co. *v.* Atty.-Gen., 124 U. S. 581.
[8] Counterman *v.* Dublin, 38 Oh. St. 515; Greencastle *v.* Black, 5 Ind. 557.
[9] Philadelphia *v.* Ridge Ave. Ry., 142 Pa. St. 484.
[10] Denny *v.* State, 144 Ind. 503.
[11] Sherrill *v.* O'Brien, 188 N. Y. 185, 212 *et seq.*